IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-4970

UNITED STATES OF AMERICA,

Appellant,

v.

MOHAMED ALI SAID, et al.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia
at Norfolk
The Honorable Raymond A. Jackson, District Judge

BRIEF OF THE UNITED STATES

Neil H. MacBride
United States Attorney

Benjamin L. Hatch
Joseph E. Depadilla
Raymond E. Patricco, Jr.
Assistant United States Attorneys
United States Attorney's Office
101 West Main Street, Suite 8000
Norfolk, Virginia 23510
(757) 441-6331

Virginia Vander Jagt
Jerome Teresinski
Trial Attorneys
U.S. Department of Justice
National Security Division
10th & Constitution Ave., N.W.
Washington, D.C. 20530
(202) 514-0849

Attorneys for the United States of America

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

PAGE

TABLE OF CONTENTS
(continued)

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES
(continued)

PAGE

CASES

TABLE OF AUTHORITIES
(continued)

PAGE

CASES

U.S. CONSTITUTION & STATUTES

TABLE OF AUTHORITIES
(continued)

PAGE

U.S. CONSTITUTION & STATUTES

TABLE OF AUTHORITIES
(continued)

PAGE

U.S. CONSTITUTION & STATUTES

TABLE OF AUTHORITIES
(continued)

PAGE

U.S. CONSTITUTION & STATUTES

COURT RULES

INTERNATIONAL AUTHORITIES

TABLE OF AUTHORITIES
(continued)

PAGE

INTERNATIONAL AUTHORITIES

TREATISES, LAW REVIEWS, AND OTHER ARTICLES

TABLE OF AUTHORITIES
(continued)

PAGE

TREATISES, LAW REVIEWS, AND OTHER ARTICLES

TABLE OF AUTHORITIES
(continued)

PAGE

TREATISES, LAW REVIEWS, AND OTHER ARTICLES

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-4970

UNITED STATES OF AMERICA,

Appellant,

v.

MOHAMED ALI SAID, et al.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia
at Norfolk
The Honorable Raymond A. Jackson, District Judge

BRIEF OF THE UNITED STATES

STATEMENT OF JURISDICTION

This is a federal criminal case, and the District Court had jurisdiction pursuant to 18 U.S.C. § 3231. On August 17, 2010, following a pre-trial defense motion to dismiss Count 1 of the superseding indictment and a motions hearing, the District Court dismissed Count 1 of the superseding indictment. Joint

Appendix (JA) 148. On September 10, 2010, the government timely filed its notice of appeal. JA 169. This Court has jurisdiction pursuant to 18 U.S.C. § 3731 and 28 U.S.C. § 1291. *See United States v. Bloom*, 149 F.3d 649, 651-54 (7th Cir. 1998).

STATEMENT OF THE ISSUE

Section 1651 of Title 18 of the United States Code makes it a crime to commit "piracy as defined by the law of nations." Does Section 1651 require, as an essential element of the offense, that the defendant take property from the victim, or does Section 1651 also encompass a violent, armed attack on the high seas, consistent with the definition of piracy under the law of nations in April 2010, when the offense conduct in this case occurred?

STATEMENT OF THE CASE

On April 21, 2010, a grand jury in the Norfolk Division of the Eastern District of Virginia returned an indictment charging six defendants, five of whom are appellees here, with violations of 18 U.S.C. § 1651 (Count 1); 18 U.S.C. § 1659; 18 U.S.C. § 113(a)(3); 18 U.S.C. § 924(o); and 18 U.S.C. § 924(c)(1)(A)(iii). JA 28-32.

On June 9, 2010, the defendants jointly moved to dismiss Count 1 of the indictment, which charged piracy under the law of nations in violation of 18 U.S.C.

§ 1651. The defendants relied on Federal Rule of Criminal Procedure 12(b)(2), which allows a party to raise by pretrial motion "any defense" that "the court can determine without a trial on the general issue." For purposes of their motion, the defendants "[a]ssum[ed] the government's allegations [were] true," JA 45, but argued that there was no dispute that they "did not take control of the USS Ashland, did not board her, and did not successfully obtain anything of value from her." JA 44.

The United States filed its response to the Motion on June 21, 2010. As a procedural matter, the United States did not dispute that it was appropriate at the pre-trial stage for the District Court to consider that defendants' asserted legal defense that an actual taking of property or seizure of the USS Ashland was necessary to constitute an offense under Section 1651. JA 60.

On July 7, 2010, a grand jury in the Norfolk Division of the Eastern District of Virginia returned a superseding indictment against the defendants. As in the original indictment, Count 1 of the superseding indictment charged a violation of Section 1651. JA 35.

On July 29, 2010, the Court heard argument on the Motion, along with various other defense motions. Though the Motion had been directed at Count 1 of

the original indictment, the District Court construed it as a motion to dismiss Count 1 of the superseding indictment.

On August 17, 2010, the Court entered an order and memorandum opinion granting the defendants' Motion. JA 148. The government timely appealed. JA 169.[1]

STATEMENT OF FACTS

As noted in the Statement of the Case above, for purposes of their motion, the defendants assumed that the government could prove its allegations. As a general matter, the charges in the superseding indictment allege that the defendants, Somali nationals, engaged in an armed assault on the USS Ashland to seize the ship and its crew.

Among other things, the United States alleges and anticipates proving at trial that on April 10, 2010, around 5:00 a.m., the USS Ashland, a United States Navy dock landing ship, was transiting the Gulf of Aden in international waters.[2] The

---

[1] After the District Court's August 17 decision, defendant Jama Idle Ibrahim pled guilty to Counts 2, 3, and 8 of the superseding indictment. JA 25. As part of the plea, the government agreed to dismiss the remaining counts against defendant Ibrahim, and he is accordingly not a party to this appeal.

[2] This Statement of Facts is derived from the superseding indictment, the facts as described in the government's response to the defendants' motion to dismiss Count 1, JA 60, and additional facts the government anticipates proving at trial. Because the defendants raised their defense pre-trial, the defendants do not

Gulf of Aden lies between the northern coast of Somalia and the southern coast of Yemen. At that time, the defendants were in a dual-engine skiff and they approached the USS Ashland from the aft. As the defendants' skiff came up even with the USS Ashland on the ship's port side, at least one person in the defendants' skiff raised a firearm and began firing at the USS Ashland.

The USS Ashland returned fire and the defendants' skiff exploded and burned. Later, members of the USS Ashland's crew drew close and observed the remains of the defendants' skiff, which was not safe to board due to its condition. The sailors observed in the skiff, among other things, at least one ladder and the remains of an AK-47 style firearm.

The United States anticipates proving that the attack on the USS Ashland was an act of piracy in which all of the defendants willingly engaged and participated. The defendants were planning on pirating a merchant vessel, but due to the lighting conditions and the appearance of the USS Ashland, they thought the USS Ashland could be a merchant vessel.

---

and cannot contest, at this stage, the facts as alleged in the superseding indictment and the facts the government anticipates proving; the government has conceded only the fact that the defendants did not successfully take the USS Ashland in the course of their attack.

The defendants' attack was consistent with the nature of Somali pirate attacks. The area in which the defendants attacked the USS Ashland is a major international shipping lane. Somali pirates attack vessels with firearms, including AK-47's, and at times with rocket propelled grenades. The purpose of such attacks is to cause the merchant ship to stop and surrender. After the merchant vessel stops, the pirates board the merchant vessel using hooked ladders, such as the one in the defendants' skiff, and seize the vessel and its crew. The vessel and the crew are then held for ransom.

In its August 17 decision dismissing Count 1 of the superseding indictment, the District Court concluded that *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), supplied the controlling definition of "piracy" for purposes of Section 1651 as "robbery or forcible depredations, *animo furandi*, upon the sea." JA 153-54 (quoting *Smith*, 18 U.S. at 162). Although acknowledging that it was faced with the task of interpreting this piracy statute "[f]or the first time since 1820," JA 152, the District Court found that the definition of piracy under the law of nations had not changed "since its pronouncement in 1820" in the *Smith* decision. JA 154. The District Court also found that the reference to "forcible depredations" in the *Smith* decision did not expand the definition of piracy under the law of nations beyond "sea robbery." JA 157-58.

For further support of its view that the definition of piracy under Section 1651 "has remained unchanged" since 1820, the District Court relied on "[s]ubsequent Congressional [a]ctions," noting that Congress has not substantively modified Section 1651 since its original enactment, and focusing on the adoption of 18 U.S.C. § 1659, which makes it a crime to "attack[] or set[] upon any vessel belonging to another, with an intent unlawfully to plunder the same," both "upon the high seas" and in any "other waters within the admiralty and maritime jurisdiction of the United States." JA 158-60.

The District Court rejected the government's argument that "piracy as defined by the law of nations" under Section 1651 should be interpreted according to customary international law as of the time of the charged conduct. JA 160-65. Despite noting that the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea both define "piracy" to cover attacks such as the one at issue in this case, JA 162, the District Court relied on various scholars and other secondary sources to conclude that the definition of piracy under contemporary international law is "unsettled." JA 160-65.

Although the District Court indicated that if it relied only on "the Government's international sources" to construe Section 1651, "it could hold that the charged conduct in this case is sufficient to withstand a Motion to Dismiss," JA

165, the court concluded that such a construction would be contrary to *Smith* and would raise due process concerns. JA 165-67. In the end, the District Court adopted "[t]he *Smith* definition of piracy as sea robbery" because it was "clear and authoritative." JA 166-67.

SUMMARY OF ARGUMENT

Since the early days of our nation, Congress has sought to combat piracy by criminalizing it in a variety of ways. Beginning in 1819, Congress devoted one statute – what is now Section 1651 of Title 18 – to criminalizing "piracy as defined by the law of nations." 18 U.S.C. § 1651. Today, piracy is once again on the rise. Off the coast of Somalia, pirates attack merchant vessels in an effort to capture them and to hold the vessels and their crews for ransom. Sometimes these attacks are successful; many times they are not. Customary international law, the modern term for the law of nations, prudently includes both the successful and unsuccessful pirate venture in its definition of piracy. The definition of piracy under customary international law is reflected in two broadly accepted multilateral treaties: the 1958 Geneva Convention on the High Seas, which has been ratified by the United States, and the 1982 United Nations Convention on the Law of the Sea. Accordingly, Section 1651, which specifically incorporates that customary

international law, reaches the same violent attacks on the high seas that customary international law defines as piracy.

Under the District Court's holding, however, Section 1651 remains frozen in time, tied forever to the definition of piracy in 1819, when an earlier version of the statute was construed by the Supreme Court in 1820. As a result, the United States' sole criminal statute that is devoted to piracy under the law of nations fails to reach exactly that.

The District Court's holding is inconsistent with Section 1651's text and purpose. Like other statutes that reference the law of nations, Congress designed Section 1651 to incorporate the evolving law of nations over time. In that way, Congress and the courts can be certain that Section 1651 will be consistent with international law over time. This consistency is particularly important because Section 1651 is designed to take advantage of the universal jurisdiction that customary international law confers over pirates. Should Section 1651 fail to keep pace with developments in the law of nations, as the District Court held, it would come unhinged from its universal jurisdictional basis, resulting in cases where the statute purported to criminalize conduct over which there is no universal jurisdiction or where, as is the result of the District Court's holding, the statute is construed not to criminalize conduct over which there is universal jurisdiction

under international law. Construing Section 1651 to track developments in the law of nations avoids those problems.

The District Court's due process concerns were misplaced. The statute is not vague, as applied to the defendants' conduct, because their armed assault on the USS Ashland is clearly covered by the customary-international-law definition of piracy. Nor is there any doubt that the defendants had adequate notice that their conduct was criminalized by Section 1651. As a matter of due process, there is no general restriction on Congress' ability to incorporate into a criminal statute a standard that is subject to change independent of federal statutory law. Indeed, a criminal defendant in a prosecution under Section 1651 is particularly well protected. The government must show that the offense conduct rose to the level of piracy under customary international law. Among other evidence demonstrating the scope of piracy under customary international law, two multilateral international treaties reflecting the consensus of over 160 nations, including the defendants' home country of Somalia, declared their conduct to be piracy. The defendants can hardly claim that they did not understand that their violent, armed assault constituted piracy.

ARGUMENT

I. The Defendants' Conduct – an Armed Attack on the High Seas Against the USS Ashland for Purposes of Hijacking the Ship – Clearly Violated Section 1651.

A. Standard of Review

The District Court's dismissal of Count 1 is reviewed de novo because it was a purely legal decision based on facts that were not disputed, *i.e.*, that the defendants failed to take physical control over the USS Ashland or to take any property from the crew. *See United States v. Woolfolk*, 399 F.3d 590, 594 (4th Cir. 2005) (legal conclusions reviewed de novo). Under the standards applicable to defendants' Rule 12(b)(2) motion to dismiss, the District Court's decision should be reversed unless the actual seizure of the USS Ashland or the taking of property from the ship are legally necessary elements of a Section 1651 offense.

B. The Law-of-Nations Definition of Piracy, which Congress Specifically Incorporated by Reference in Section 1651, Is Not Limited to Common Law Robbery on the High Seas.

The defendants are charged with violating Section 1651, which provides:

> Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.

18 U.S.C. § 1651.[3] Section 1651 is the only provision of the United States Code that incorporates the law-of-nations definition of piracy.[4] As explained below, the statute ensures that the United States has a domestic criminal prohibition of conduct that constitutes piracy under the law of nations. Analysis of statutory text and purpose demonstrates that Section 1651 incorporates the law-of-nations definition of piracy at the time of the offense.

---

[3] The earliest version of Section 1651 was enacted in 1819 as Section 5 of An Act to Protect the Commerce of the United States and Punish the Crime of Piracy ("1819 Piracy Act"), ch. 77, § 5, 3 Stat. 511 (1819). In 1820, as Section 5 of the 1819 Piracy Act was approaching its expiration date, Congress passed the Act To Continue In Force "An Act To Protect the Commerce of the United States, And Punish the Crime of Piracy," ("1820 Piracy Act"), ch. 113, § 2, 3 Stat. 600 (1820). The substance of Section 1651 (still with a mandatory death sentence) was included as Section 5368 of the Revised Statutes of 1873-74. Crimes Arising Within the Maritime And Territorial Jurisdiction of the United States, ch. 3, § 5368, 18 Stat. 1042, 1047 (1874). In 1909, the statute was substantively changed to reduce the sentence from a mandatory death sentence to mandatory life imprisonment. Piracy And Other Offenses Upon The Seas, ch. 321, § 290, 35 Stat. 1145 (1909). *See also* 18 U.S.C. § 481 (1930) (codification of former Criminal Code section into United States Code without substantive revision to statute); Act of June 25, 1948, ch. 645, 62 Stat. 774 (1948) (codification of former 18 U.S.C. § 481 at 18 U.S.C. § 1651 without substantive revision).

[4] The government uses the terms law of nations, customary international law, and international law interchangeably throughout this brief.

1. When Congress Enacted the Original Version of Section 1651, It Incorporated the Law-of-Nations Definition of Piracy So Section 1651 Would Continue to Track Developments in Customary International Law.

Given that, as demonstrated below, the defendants' conduct clearly fell within the definition of piracy supplied by customary international law at the time of the offense conduct charged in this case, the District Court's decision should be reversed if Section 1651 is construed to incorporate the definition of piracy supplied by the law of nations at the time of the offense conduct (here, 2010), as opposed to the time the law was first enacted (1819). As explained below, the text and history of Section 1651 lead to the conclusion that the statute in fact incorporates the definition of piracy under customary international law as of the time of the offense conduct.

a. Section 1651 tracks developments in the law-of-nations definition of piracy over time.

In concluding that Section 1651 should be construed to reference the law-of-nations definition of piracy extant in 1819, the District Court relied on the canon of statutory construction that terms in statutes are presumed to have the meaning associated with them at the time of statutory enactment. The government does not dispute that such is the usual presumption when interpreting statutes.

In this case, that presumption is fully consistent with interpreting the statute, which specifically incorporates the "law of nations" definition of piracy, to incorporate that definition at the time of the offense. As a general matter, Congress can and does craft criminal statutes that incorporate a definition of an offense supplied by some other body of law that may change or develop over time. *See* 18 U.S.C. § 1961 (RICO statute incorporating state law offenses); 18 U.S.C. § 13 (Assimilated Crimes Act incorporating state law offenses). Criminal statutes also incorporate the laws of foreign countries. *See*, *e.g.*, 16 U.S.C. § 3372(a)(2)(A) (the Lacey Act, prohibiting commercial activities involving "fish or wildlife taken, possessed, transported, or sold in violation of . . . any foreign law"); 18 U.S.C. § 1956(c)(1) and (7)(B) (defining money laundering in part as involving proceeds of activity that is known to "constitute[] a felony under State, Federal, or foreign law" and that involves certain "offense[s] against a foreign nation"). These criminal statutes are not generally limited to the state law, federal regulation, or foreign law that existed when Congress acted.

When Congress enacted the predecessor of Section 1651, and when it subsequently revised and codified the statute, Congress understood that the law of nations, like the common law, evolves through application, experience, and custom. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004) (noting First

Congress' understanding of courts' ability to identify norms of international law and concluding that "it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism"). Thus, when it referred to the definition of piracy supplied by the law of nations, Congress meant to track the definition supplied by the law of nations as that body of law developed over time. *Cf. Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804) (acts of Congress should be construed in a manner consistent with the law of nations).

If Congress had rather intended a static definition, it could have written that definition in the statute itself or made clear in the statutory text that the term "piracy" was to be defined as of a specific date, such as the date of original enactment. *Compare* 22 U.S.C. § 406 (exempting from statutory limitations on the export of war materials "trade which might have been lawfully carried on before June 15, 1917 [the date of Section 406's enactment, *see* 40 Stat. 225], under the law of nations"). If, for example, Congress believed that the law-of-nations

definition of piracy were limited only to robbery at sea, it could have simply declared robbery at sea to be piracy.[5]

Construing Section 1651 to track the law of nations over time is consistent with the purpose of the statute. By referencing the law-of-nations definition of piracy in Section 1651, Congress defined the scope of the criminal prohibition in a manner commensurate with the universal jurisdiction supplied by international law over pirates. *See* Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 345 (1925) (describing the enactment of Section 5 of the Act of 1819 as a response to *United States v. Palmer*, 16 U.S. (3 Wheat) 610 (1818), which excluded foreign acts of piracy from the ambit of an earlier piracy statute). It has long been established that there is universal jurisdiction over the crime of piracy under international law. *See, e.g.*, *United States v. Shi*, 525 F.3d 709, 723 (9th Cir. 2008). And yet construing Section 1651 as the District Court did undermines this clear congressional purpose by uncoupling Section 1651's criminal scope from its jurisdictional grasp. If the charged conduct in this case is defined as piracy under current customary international law, as the District Court appeared to

[5] Congress did declare robbery at sea to be piracy in Section 3 of the 1820 Piracy Act, 3 Stat. 600, and robbery on the high seas is proscribed to this day by 18 U.S.C. § 2111. Yet Congress has never modified Section 1651 to limit its definition of piracy only to robbery at sea.

acknowledge, JA 165, then there is universal jurisdiction to prosecute the defendants. However, under the District Court's reasoning, Section 1651 does not criminalize their conduct because it is limited to the 1819 definition of piracy. So, Section 1651's criminal reach is not commensurate with its jurisdictional potential, under the District Court's reasoning.[6]

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), confirms that a statutory reference to the law of nations incorporates subsequent developments in that body of law. In *Sosa*, the Supreme Court construed the Alien Tort Statute (ATS), 28 U.S.C. § 1350, which vests federal district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." As pertinent here, the Supreme Court held that the ATS could grant federal courts jurisdiction over a tort committed in violation of a *current* customary international law norm, even though the current norm was non-existent at the time the ATS was originally enacted. 542 U.S. at 725 (referring to claims "based on the present-day law of nations"); *id.* at 729 ("the door is still

[6] This problem could also manifest itself in the converse way. If the law-of-nations definition of piracy *narrowed* over time, a domestic criminal statute that was limited to the older, outdated definition would fail to track the law of nations and thus could purport to criminalize conduct that would not in fact trigger universal jurisdiction.

ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today").

In so doing, the Supreme Court necessarily rejected the argument that claims authorized by the ATS were only those violations of the law of nations existing at the time the ATS was originally enacted as part of the Judiciary Act of 1789. And, although the Court ultimately concluded that the specific alleged law-of-nations tort at issue in the case was not sufficiently recognized to be actionable under the ATS at the time of the alleged tort, the Court considered authorities from the 20th century – well after 1789 – to decide the point. *See* 542 U.S. at 736 n.27. *See also Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) ("Thus it is clear that courts must interpret international law [in the ATS] not as it was in 1789, but as it has evolved and exists among the nations of the world today.") (citation omitted); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (looking to norms of "contemporary international law" to interpret "the law of nations" as used in the ATS).

Although *Sosa* did not involve a criminal statute, the Supreme Court has followed the same methodology in the context of violations of the law of war, which is part of the law of nations. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court considered a reference (in what was then Article 15 of the Articles of War)

to offenses that could "by the law of war" be tried by military commissions. *Id.* at 27. The Court specifically held that Congress's reference to "the law of war" was an invocation of international law and that Congress had chosen to "adopt[] the system of common law applied by military tribunals" instead of "crystallizing in permanent form and in minute detail every offense against the law of war." *Id.* at 30. Moreover, *Quirin* specifically compared the statute there – in which the cross-reference to international law was not frozen at the time of enactment – to the statutory predecessor of Section 1651 "punishing 'the crime of piracy as defined by the law of nations.'" *Id.* at 29. *See also In re Yamashita*, 327 U.S. 1, 7-8 (1946) (noting that Congress "had not attempted to codify the law of war or to mark its precise boundaries" but had instead "incorporated, by reference . . . all offenses that are defined as such by the law of war"). *Quirin* did not inquire as to the state of the law of war when Article 15 was first enacted in 1916, *see Yamashita*, 327 U.S. at 64 n.30, but rather relied on various sources continuing up to the date of the offense, *see, e.g.*, 317 U.S. at 30 n.7, 31 n.8, 34, 35 n.12.

Although *Quirin* was subjected to extended analysis in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *Hamdan* did not question the conclusion that Congress' reference to "the law of war" was not crystallized at the time of enactment. Instead, the Supreme Court reaffirmed *Quirin*'s approach to the issue. The

plurality opinion in *Hamdan* stated that, by virtue of the reference to "the law of war" in Article 21 of the Uniform Code of Military Justice, "Congress . . . has 'incorporated by reference' the *common law* of war, which may render triable by military commission certain offenses not defined by statute." 548 U.S. at 602 (quoting *Quirin*, 317 U.S. at 30) (emphasis added). None of the Justices treated the law-of-war inquiry as being limited to the time when Congress adopted Article 21 of the Uniform Code of Military Justice – much less to the time when Congress initially adopted Article 21's materially identical predecessor in 1916. *See id.* at 592 n.22 (majority opinion) (noting the prior history of Article 21); *see also id.* at 595 (recognizing that military commissions can be "justified under . . . the law of war"); *id.* at 641 (Kennedy, J., concurring in part) (explaining that the legality of a military commission depends upon "the law of war," which "derives from 'rules and precepts of the law of nations'") (quoting *Quirin*, 317 U.S. at 28); *id.* at 689 (Thomas, J., dissenting) ("whether an offense is a violation of the law of war cognizable before a military commission must be determined" under "the common law of war").

A number of sections in the United States Code reference the law of nations, and there is no reason to think that Congress intended for each of those various references to be dependent for its definition on the particular time in which it was

enacted. *See* 18 U.S.C. §§ 756, 957, 967, 2274, 3058, 3185; 22 U.S.C. §§ 406, 462; 28 U.S.C. §§ 1350, 2241; 33 U.S.C. §§ 384, 385. That Congress did not intend a law-of-nations reference in a statute to be frozen at the time of original-enactment is illustrated by Sections 384 and 385 of Title 33. Both of those sections reference the law of nations, and both are addressed to a similar piracy forfeiture issue. Yet, under the District Court's approach in this case, courts would have to use the law-of-nations definition of piracy in 1819 for Section 384 (when an earlier version of Section 384 was first enacted) and the law-of-nations definition of piracy in 1861 for Section 385 (when it was first enacted). Congress could not have intended such a result.

b. The District Court misread the Supreme Court's decision in *United States v. Smith*.

No case cited by the District Court or defense counsel below holds that when Congress references a body of law such as the "law of nations" in a statute, it intends to lock in a "snapshot" of that law at the time of the original enactment. The District Court's "snapshot" method is flatly inconsistent with the way the Supreme Court construed the Alien Tort Statute, the Articles of War, and the Uniform Code of Military Justice in *Sosa*, *Quirin*, *Yamashita*, and *Hamdan*.

The District Court did rely on *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), but it misread *Smith*. In *Smith*, the Supreme Court did not address whether the statute incorporated the law of nations as of the time of the offense, or as of the time of enactment, and of course it had no occasion to do so, since the time of the offense (April 1819) was so soon after the time of the statute's enactment (March 3, 1819), *see* 18 U.S. at 154. Moreover, the Court obviously did not address the dispositive issue in this case: what constituted "piracy" under the law of nations in April 2010. Nor did the Court consider whether an unsuccessful armed attack constitutes piracy. In any event, *Smith*'s definition of piracy as of 1819 was still broad enough to encompass the defendants' armed attack on the USS Ashland.[7]

On its own terms, the *Smith* decision was narrow. *Smith* involved the completed robbery of a Spanish vessel. *Id.* at 154. The defendant challenged the jury's verdict on the ground that the law of nations failed to define the offense of piracy with reasonable certainty. *Id.* at 160. The Supreme Court rejected the defendant's argument. Based on its examination of various treatise writers and court decisions, the Court concluded that "*whatever may be the diversity of definitions, in other respects*, all writers concur, in holding, that robbery, or

[7] As explained below, the *Smith* definition of piracy embraces the offense conduct in this case. *See infra* pp. 44-45.

forcible depredations' upon the sea, *animo furandi*, is piracy." *Id.* at 161 (emphasis added). The Court held that the robbery-or-forcible-depredations-on-the-sea definition was set forth in the law of nations and that the precursor statute to Section 1651 adequately defined the crime. *Id.* at 162.

Significantly, in *Smith*, the Court considered only whether the law of nations defined piracy with sufficient certainty to support the jury's special verdict rendered in that case – a special verdict which included the jury's finding that the defendant had engaged in the "plunder and robbery" of a Spanish vessel. That the Court's holding would be so limited arises naturally from the general rule that the Court addresses only the issues before it. *See, e.g.*, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."). That the Court was only focused on the facts before it is further demonstrated by Justice Story's statement at the end of footnote h, which marshaled authorities supporting the robbery-or-forcible-depredations definition, that those gathered authorities were "submitted to the learned reader to aid his

future researches in a path, which, fortunately for us, it has not been hitherto necessary to explore with minute accuracy." *Smith*, 18 U.S. at 163 n.h.

That Justice Story's references in *Smith* to "robbery" were not intended to limit piracy to the common law elements of robbery in England is well illustrated by other opinions authored by Justice Story. In *United States v. Tully*, 1 Gall. 247, 28 F. Cas. 226 (C.C. Mass. 1812), Justice Story, sitting as Circuit Justice, instructed a jury in a prosecution under a statute that pre-dated what is now Section 1651. According to those instructions, piracy at common law included all acts of "robbery and depredation" on the high seas that would have amounted to a felony on land, and that "it was not necessary by the common law, that the offense should be committed with all the facts necessary to constitute the technical crime of robbery." *Id.* at 228 (internal citations omitted) (emphasis added). *See also id.* at 229 (Davis, J., agreeing that elements of common law robbery are not necessary); *The Malek Adhel*, 43 U.S. 210, 232 (1844) (Story, J.) (in a case involving piratical forfeiture, stating that if a pirate "willfully sinks or destroys an innocent merchant ship . . . it is just as much a piratical aggression, in the sense of the law of nations . . . as if he did it solely and exclusively for the sake of plunder, *lucri causa*").

The District Court marshaled a number of cases for the proposition that *Smith*'s definition of piracy has "reached a level of concrete consensus in United

States law since its pronouncement in 1820." JA 154-55. These decisions do not, in fact, support that conclusion. Most of the decisions do not interpret the definition of piracy at all; even those with some passing bearing on piracy merely describe what *Smith* stated. *See, e.g., United States v. Madera-Lopez*, 190 Fed. Appx. 832 (11th Cir. 2006) (unpublished) (narcotics case that merely quotes *Smith* and notes that it has no impact on the case at hand); *United States v. Barnhart*, 22 F. 285, 288 (C.C.D. Or. 1884) (manslaughter case that discusses in dicta concept of universal jurisdiction as it applies to double jeopardy). Those few cases that even involve the definition of piracy do not purport to address the issue presented in this case. *See, e.g., Taveras v. Taveraz*, 477 F.3d 767, 772 n.2 (6th Cir. 2007) (addressing high seas requirement). What these opinions show is that it is easy, in passing reference, to refer to piracy as robbery at sea. Like *Smith* itself, none of the decisions reach the issue in this case: whether Section 1651 incorporates the law-of-nations definition of piracy as it develops over time.

c. Section 1651 is consistent with Section 1659 and other provisions of Chapter 81 of Title 18.

The District Court concluded that the government's interpretation of Section 1651 would render that statute essentially redundant with Section 1659 of Title 18. JA 159-60. The District Court considered that result anomalous because Section

1651 carries a mandatory life sentence and Section 1659 carries only a maximum sentence of 10 years. JA 160.

Section 1659 does not govern the interpretation of Section 1651; the two provisions overlap but are consistent. The original version of Section 1659 was enacted in 1825 by a different Congress than the one that passed the earlier version of Section 1651 in 1819. *See* An Act to Protect the Commerce of the United States and to Punish The Crime of Piracy, ch. 77, § 5, 3 Stat. 511 (1819); Act To Continue In Force "An Act To Protect the Commerce of the United States, And Punish the Crime of Piracy," ch. 113, § 2, 3 Stat. 600 (1820).[8]

Although the offense conduct proscribed by Section 1659 is similar to that which is proscribed by Section 1651, the two provisions have different jurisdictional scopes. Section 1659 includes United States territorial and internal waters within its scope, and therefore it is not solely focused on the heightened danger of attacks on the high seas, like Section 1651. And even with respect to those areas in which Sections 1651 and 1659 overlap, the mere fact of overlapping

[8] There is some question whether Section 2 of the 1820 Piracy Act actually extended the duration of Section 5 of the 1819 Piracy Act generally, or whether it simply continued Section 5 in force for crimes that had already been committed during the 1819-1820 effective period of the original statute. *See* Botkin, *et al.*, Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States XXV (1901).

criminal liability is unexceptional. Overlapping criminal prohibitions are a fact of the United States Code, and the Supreme Court has noted that "[t]he mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either." *Pasquantino v. United States*, 544 U.S. 349, 358 n.4 (2005). *See also United States v. Batchelder*, 442 U.S. 114, 123-24 (1979) ("when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants," even if the penalties are different) (citations omitted); *United States v. Mitchell*, 39 F.3d 465, 472 (4th Cir. 1994) ("It is well settled that no inherent difficulty exists in Congress' criminalizing the same conduct under two different statutes, one of which provides for misdemeanor and the other felony punishment.") (citation omitted).

That overlapping criminal liability for piracy was not a concern of Congress is demonstrated by the fact that Congress enacted an earlier version of Section 1651 at the same time as a provision criminalizing robbery at sea and designating persons guilty of that offense as "pirate[s]." *Compare* Crimes Arising Within the Maritime And Territorial Jurisdiction of the United States, ch. 3, § 5368, 18 Stat. 1042, 1047 (1874), *with id.* § 5370. That Section 1651 will overlap with other provisions of the federal criminal code relating to piracy and robbery at sea is therefore inevitable under any interpretation.

Even assuming Congress had Section 1651 in mind when it passed Section 1659, Congress could well have considered it appropriate to have one statute – Section 1659 – with an offense definition frozen in time to cover conduct that could also be covered by another statute – Section 1651 – that has a definition of offense conduct that could change over time. By doing so, Congress ensured that a fixed category of conduct is prohibited (Section 1659), and that so too is whatever over time falls within the compass of the incorporated body of law (here, international law) in Section 1651. And there is nothing strange about giving prosecutors and juries different offenses and different levels of punishment that fit the same basic facts. This happens frequently, and could have been particularly useful in the 19th century when the only penalty authorized by the precursor of Section 1651 was death; recognizing that some jurors or judges may have been reticent to impose that ultimate penalty in every piracy case, Congress could have intended Section 1659 to create a lesser penalty option to avoid the hard choice between death and acquittal in certain cases.

Perhaps related to the District Court's concern over the lower penalty supplied by Section 1659, the District Court also rejected the government's interpretation of Section 1651 in part because it would supply a mandatory life sentence to high seas attacks with a slingshot. JA 160. This case does not present

the issue of an attack with a slingshot, and, as noted below, a criminal statute clear in application to the offense conduct at hand is not rendered invalid merely because some applications could be unclear. *See infra* p. 52. But the fact is that the law-of-nations definition of piracy is necessarily broad – "any illegal act of violence" – when it comes to the types of attacks included in piracy. *See infra* p. 33. Pirates historically have attacked with cutlasses and knives. There is no reason in domestic precedent or international law to suppose that the crime of piracy turns on whether the pirate chose a relatively more effective weapon or a relatively less effective weapon with which to attack.

Of course, the appropriate penalty for a crime is a matter for Congress to determine, subject only to constitutional constraints. Section 1651's scope and penalty provisions are consistent with other crimes regarding piracy. Just a few decades prior to the enactment of the 1819 statute, the then-existing piracy statute decreed that someone who committed any of the following acts (in addition to murder and robbery) in particular maritime areas was a pirate, and a death sentence applied: stealing any goods up to fifty dollars, yielding a ship to pirates, laying violent hands on a captain to prevent the ship's defense, and revolting against a seaman's commander. Act of Apr. 30, 1790, § 8, 1 Stat. 112.

Section 1652 states that any United States citizen who commits "any act of hostility" against the United States or its citizens on the high seas under color of a foreign commission shall be imprisoned for life. Section 1652 is broad enough, therefore, to include the attack alleged in this case. The earliest version of Section 1652 was enacted in 1790. *See* Act of Apr. 30, 1790, § 8, 1 Stat. 112. *See also* 18 U.S.C. § 1653 (mandatory life sentence for aliens who commit piracy in violation of a treaty, including "cruising against the vessels and property [of the United States]"); *id.* § 1655 (mandatory life sentence for a seaman who "lays violent hands" on his commander to obstruct the commander fighting in defense of his vessel or good entrusted to him); *id.* § 1661 (mandatory life sentence for pirates who commit robbery on shore).

These other provisions of Chapter 81 show that Congress deems piracy, in its various manifestations, to be a particularly heinous crime deserving of a mandatory life sentence in a wide range of circumstances that are not dependant on the type of weapons used in the commission of the offense.

2. The Law of Nations, or Customary International Law, in and before 2010 Clearly Included the Defendants' Conduct in Its Definition of Piracy.

Since Section 1651 incorporates the law of nations definition of piracy at the time of the offense, the only remaining question is whether the alleged conduct in this case fits within the definition of piracy under customary international law as of April 2010. As explained below, it did, and clearly so.

a. Widely accepted international treaties – specifically the Geneva Convention and UNCLOS – reflect the customary international law definition of piracy.

The law of nations was well understood by the Founders, which specifically referred to that law in the Constitution. *See* U.S. Const. art. I, § 8, cl. 10 (Congress has the power to define and punish "Piracies . . . committed on the high Seas, and Offences against the Law of Nations"). The law of nations is more commonly called customary international law today. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (a claim under the law of nations "must be gauged against the current state of international law").

Courts consult a variety of sources to determine whether a particular rule has been established as customary law, but one of the most important sources to be consulted are broad-based international agreements that are intended to reflect existing rules of customary international law. In such cases, "[t]he customary international law of a certain area is itself codified in a treaty." *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000). In addition to treaties that

successfully codify customary international law, courts may also look to international custom, and the general principles of law recognized by civilized nations, including through their courts. *See United States v. Yousef*, 327 F.3d 56, 103 (2d Cir. 2003) (looking to "formal lawmaking and official actions of States"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1986); Intern'l Court of Justice Statute, June 26, 1945, art. 38, 59 Stat. 1055, 1060, U.S.T.S. 993.

In the 20th century, there were two relevant international conventions of the law of the sea – the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea – both of which were designed to be declaratory of customary international law as to piracy and both of which defined piracy to include the conduct charged in this case. Indeed, the District Court agreed with the government, JA 162, and the defendants did not dispute, that the definition of piracy contained in these multilateral international agreements includes the offense conduct charged in this case.

The 1958 Geneva Convention on the High Seas (hereinafter the "Geneva Convention") includes the following in the definition of piracy:

> (1) *Any illegal acts of violence*, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship . . . , and directed:

> (*a*) On the high seas, *against another ship* or aircraft, *or against persons* or property *on board such ship . . .*;

Convention on the High Seas, Sept. 15, 1958, art. 15, 13 U.S.T. 2312, 2317, 450 U.N.T.S. 11, 90 (emphases added) (attached hereto as Addendum A). The Geneva Convention was ratified by the President of the United States of America on March 24, 1961, pursuant to the advice and consent of the Senate provided on May 26, 1960. The treaty entered into force on September 30, 1962. In addition to the United States, there are 62 other parties to the Geneva Convention, including important seafaring states such as Australia, Germany, Italy, Japan, Spain, and the United Kingdom. *See* United Nations Treaty Collection, *2. Convention on the High Seas* (available at http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-2.en.pdf) (last visited Oct. 18, 2010).

The preamble to the Convention expresses the Parties' desire "to codify the rules of international law relating to the high seas." Geneva Convention Pmbl. During the Senate's consideration of the Geneva Convention, the Executive and

the Senate supported the view that this treaty generally reflected settled customary international law, including regarding the definition of piracy. *See* Exec. J-N, 86th Cong., 1st Sess., 9 (1959) (Executive transmittal package noting that articles dealing with piracy "reflect the existing state of international law on the subject"); Exec. Rept. No. 5, 86th Cong., 2d Sess., 10-11 (1960) (Senate Executive Report quoting from list of benefits provided by the Department of State that "the Convention on the High Seas is generally declaratory of existing principles of international law").

The Geneva Convention definition of piracy is meant to be applied in practice. Article 14 of the Geneva Convention states that "[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." Geneva Convention, art. 14. Article 19 of the Geneva Convention authorizes "every" State to seize a pirate ship, to arrest the persons on board, and to decide upon the penalties to be imposed. Geneva Convention, art. 19.

When ratifying the Geneva Convention, the United States rendered the Geneva Convention definition the law of the land. Far from the "questionable" authority the District Court considered it, JA 164, a ratified treaty is law in the United States. U.S. Const., art. VI, cl. 2. Though the District Court purported to

seek guidance from congressional action regarding Section 1651, it inexplicably refused to consider the Senate's and the President's endorsement through ratification of the definition of piracy in the Geneva Convention.

The ratified Geneva Convention is the law of the land. While the ratification occurred after the latest passage of Section 1651 in 1948, the ratification is nevertheless a better guide to what Congress would consider to be included in Section 1651's criminal prohibition than the various sources relied on by the District Court. *See* JA 158-59 (relying on a commission report dealing with the entire United States Code acknowledged not to be "a direct Congressional enactment or proclamation"); JA 159 (relying on Section 1659, which is addressed *supra* pp. 25-28). Among these sources, the District Court cited the fact that, in 1948, when Title 18 of the United States Code was comprehensively revised, Section 1651 "was not substantively updated." JA 159. The lack of substantive changes to Section 1651 is, of course, entirely consistent with congressional belief that Section 1651 always keeps current by virtue of incorporating the current law of nations.[9]

---

[9] A revision note that precedes Chapter 81 of Title 18 was inserted during the re-codification process of 1948. The revision note states that updates are needed to Chapter 81, which includes Section 1651, to reflect developments in international law. It is unclear whether this note, which covers all of Chapter 81, has any intended bearing on Section 1651; it is also unclear to what international

In 1982, the United Nations Convention of the Law of the Sea ("UNCLOS") was opened for signature. "This marked the culmination of more than 14 years of work involving participation by more than 150 countries representing all regions of the world, all legal and political systems and the spectrum of socio/economic development." Oceans and Law of the Sea, Division for Ocean Affairs and the Law of the Sea, United Nations Convention on the Law of the Sea Overview (available at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm) (last visited Oct. 18, 2010). One hundred sixty-one States, including Somalia, Australia, Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, Spain, and the United Kingdom, and the European Union are now party to UNCLOS, reflecting its near-universal acceptance. *See* United Nations Treaty Collection, *6. United Nations Convention on the Law of the Sea* (available at http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf) (last visited Oct. 18, 2010).

---

developments the note is referring. The revision note could, for example, refer to the need to address aircraft piracy, a topic which was taken up at the Geneva Convention. Even if the revision note refers to Section 1651, it suggests Congress would want that section to reflect recent developments in international law, leaving for another day revisions and modifications that would go beyond piracy as defined by international law.

UNCLOS Article 101 supplies the same substantive definition of piracy as that recognized by the Geneva Convention. *See* Convention on the Law of the Sea, Dec. 10, 1982, art. 101, 1833 U.N.T.S. 397, 436 (selected portions of which are attached hereto as Addendum B). As with the Geneva Convention, under UNCLOS, the parties agreed that piracy is a universal crime for which any country may arrest and prosecute offenders, regardless of nationality. UNCLOS provides that on the high seas, "every State may seize a pirate ship . . . and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed." UNCLOS art. 105. When states yield up jurisdiction over their vessels, *see* UNCLOS Art. 92 (a states has exclusive jurisdiction over its flagged vessels on the high seas), they have reached agreement that a particular crime is a universal one.

The United States has not ratified UNCLOS, though that decision reflects no negative judgment by the United States regarding the definition of piracy contained in Article 101. Indeed, the United States has recognized and abides by significant parts of the UNCLOS as customary international law. *See, e.g.*, Schoenbaum, 1 ADMIRALTY AND MARITIME LAW § 2-2, at 23-25 (4th ed. 2004). That the United States fully endorses the definition of piracy contained in Article 101 is demonstrated beyond doubt by the United States' acceptance of the same definition

in the Geneva Convention and subsequent Security Council resolutions discussed below. And the U.S. Navy and U.S. Coast Guard apply the same definition of piracy as that found in the Geneva Convention and UNCLOS in their operations, as reflected in the Commander's Handbook on the Law of Naval Operations, which is designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations. *See* The Commander's Handbook on the Law of Naval Operations, § 3.5.2 (July 2007 ed). The reason the United States did not pursue ratification of UNCLOS in the 1980's or early 1990's related instead to concerns regarding its deep seabed mining provisions. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Part V, Introductory Note (1986).

After the deep seabed mining provisions of the Convention were changed to the satisfaction of the United States and other countries through the 1994 Implementing Agreement, *see* Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, with Annex, President Clinton submitted the Convention and its Implementing Agreement to the Senate for its consideration. The Executive Branch's transmittal package of the treaty to the United States Senate stated that "Articles 100-107 [of UNCLOS] reaffirm the rights and obligations of all States to suppress piracy on the

high seas" and that Congress had exercised its constitutional power to criminalize piracy through Section 1651 and other statutory provisions, which were "a firm basis for implementing the relevant provisions of the Convention." U.S. Dept. of State, Dispatch Supplement, February 1995 Vol. 6, Supplement No. 1, Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary, at 18.

Various aspects of UNCLOS have been recognized as reflecting customary international law. *See, e.g.*, Schoenbaum, 1 ADMIRALTY AND MARITIME LAW §2-2, at 23-25 (4th ed. 2004) (examining which portions of UNCLOS have been recognized by the United States). Indeed, after the District Court's ruling below, and in connection with a motions hearing in *United States v. Mohamed Hasan, et al.*, 2:10cr56, which is another case in the Eastern District of Virginia that presents the same issue as that presented here, Department of State Legal Adviser Harold Hongju Koh submitted a declaration stating that, in his opinion, the definition of piracy contained in the Geneva Convention and UNCLOS constitutes the definition of piracy under the law of nations. *Cf. Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."). Though the Koh Declaration is not specifically in the record of this case below, it is the position of the Department of

State's Legal Adviser on the definition of piracy under customary international law.

UNCLOS Article 101 is what the international community is applying in the fight against piracy. In 2008, the United Nations Security Council stated unanimously in Resolution 1851, which was adopted specifically to address the growing problem of piracy off the coast of Somalia, that "international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), sets out the legal framework applicable to combating piracy and armed robbery at sea." U.N. Sec. Council Res. 1851, 1 (2008) (available at http://www.un.org/Docs/sc/unsc_resolutions08.htm) (last visited Oct. 18, 2010). Resolution 1851 was approved by the United States and the other members of the Security Council and was issued after a request from the government of Somalia for aid in combating piracy occurring off its coast.

The conclusion that UNCLOS reflects the applicable legal framework has been repeatedly reaffirmed by the U.N. Security Council, each time by unanimous approval of the Council. *See* U.N. Sec. Council Res. (UNSCR) 1918 (Apr. 27 2010) ("Reaffirm[ing] that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 . . ., in particular its articles 100, 101 and 105, sets out the legal framework applicable to combating

piracy and armed robbery at sea. . . ."); UNSCR 1897 (Nov. 30, 2009); UNSCR 1846 (Dec. 2, 2008); UNSCR 1838 (Oct. 7, 2008); UNSCR 1816 (June 2, 2008).

Resolution 1851 called "upon States . . . that have the capacity to do so, to take part actively to fight against piracy and armed robbery at sea off the coast of Somalia, consistent with . . . international law, by deploying naval vessels" and through the seizure of pirate ships. UNSCR 1851 at 2. The international community answered this call to fight piracy off the coast of Somalia by committing naval resources in a joint anti-piracy effort, which operates consistent with the United Nations Security Council Resolutions that rely on the UNCLOS definition of piracy. The United States, the European Union, NATO, and individual nations such as China, India, Japan, Malaysia, Russia, Saudi Arabia, South Korea, and Yemen, are all participating in this joint effort. *See* State Department, "Piracy Off the Coast of Somalia and the Response by the United States and International Community," (available at http://www.state.gov/t/pm/ppa/piracy/index.htm) (last visited Oct. 18, 2010). *See also, e.g.*, *Thai Navy Joins Anti-Piracy Mission Off Somalia*, DefenseNews (Sept. 10, 2010) (available at http://www.defensenews.com/story.php?i=4774223&c=SEA&s=TOP) (last visited Oct. 18, 2010); *International Navies Coordinate to Deter Somali Pirates*,

America.gov (Feb. 19, 2010) (available at http://www.america.gov/st/peacesec-english/2010/February/20100219174011SJhtroP0.8000299.html) (last visited Oct. 18, 2010); *U.S. Navy to lead anti-piracy force*, USA Today (Jan. 8, 2009) (available at http://www.usatoday.com/news/world/2009-01-08-us-piracy_N.htm) (last visited Oct. 18, 2010). The fact that the international community has acted in accordance with UNCLOS and the Geneva Convention to repress piracy is further evidence that those treaties reflect customary international law on this subject. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 257 (2d Cir. 2003) ("Similarly, the evidentiary weight of a treaty increases if States parties have taken official action to enforce the principles set forth in the treaty either internationally or within their own borders.").[10]

[10] Further support is provided by a 1997 statute of the United Kingdom, which declares, "[f]or the avoidance of doubt," that "for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, [articles 101, 102, and 103] of the United Nations Convention on the Law of the Sea 1982 . . . shall be treated as constituting part of the law of nations." Merchant Shipping and Maritime Security Act 1997, c. 28, § 26(1) & sched. 5 (available at http://www.legislation.gov.uk/ukpga/1997/28/section/26) (last visited Oct. 18, 2010).

In summary, the Geneva Convention and UNCLOS reflect customary international law with respect to piracy, and they clearly include the defendants' conduct in their shared definition of piracy.

b. Reference to other sources for determining customary international law supports the Geneva Convention and UNCLOS' inclusion of violent attacks on the high seas in the definition of piracy.

Although this Court need look no further than the Geneva Convention and UNCLOS, which clearly reflect the content of customary international law as of April 2010, other sources further confirm that violent attacks on the high seas have long been included in the law-of-nations definition of piracy.

In 1800, John Marshall, then a Congressman and soon to be Chief Justice, gave a famous speech defending President Adams' conduct in the controversial extradition of Jonathan Robbins, who was also referred to as Thomas Nash. *See* Newmyer, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 135-38 (2001). Though the speech was not primarily concerned with piracy, Marshall touched upon the subject and defined piracy as follows:

> A pirate, under the law of nations, is an enemy of the human race [*hostis humanis generis*]. Being the enemy of all, he is liable to be punished by all. Any act which denotes this universal hostility, is an

> act of piracy. *Not only an actual robbery, therefore, but cruising on the high seas without commission, and with intent to rob, is piracy.*

United States v. Robins, 27 F. Cas. 825, 862 (D.C.S.C. 1799) (reproducing Marshall's speech and surrounding debate in House of Representatives) (emphases added). Marshall's speech won praise from many quarters, including Justice Story. *Id.* at 860 ("Mr. Marshall (whose speech, as given in a note to Bee's reports . . . is said by Judge Story to be among the very ablest arguments on record . . .)").

Though not controlling in this case, for the reasons given above, the definition of piracy in *United States v. Smith*, 18 U.S. 153 (5 Wheat.) (1820), as robbery, or forcible depredations, *animo furandi*, upon the sea, is broad enough to encompass the offense conduct in this case. "Forcible depredations" are not a form of a common law crime, and *Smith*'s references to robbery included that term as used in a variety of international sources. The offense conduct charged in this case would therefore constitute robbery, as that term was used in the general sense in *Smith*, or at the very least a "forcible depredation *animo furandi*." *See Webster's New International Dictionary* 703 (2d ed. 1959) (defining depredate as "to plunder and pillage; to despoil; to lay waste; to prey upon"); *Webster's Revised Unabridged Dictionary* (1828) (defining depredation as "the act of plundering; a robbing; a pillaging" and depredate as "to plunder; to rob; to pillage; to take the

property of an enemy or of a foreign country; to prey upon; to waste; to spoil"). Indeed, by noting an intent element – *animo furandi* – the Supreme Court implied that conduct falling short of completed robbery, plunder, or pillaging fell within the definition of piracy. One does not normally refer to someone who engaged in "robbery with intent to rob."

Smith also cited approvingly from the works of treatise writers who defined piracy in a manner that includes the offense conduct here. *United States v. Smith*, 18 U.S. 153, 163 n.h (1820) (citing Azuni and Molloy). *See also* I Hawkins, PLEAS OF THE CROWN, Ch. 10, p. 251 (8th ed. 1824) (a pirate is "one who, to enrich himself, either by surprise or open force, *sets upon* merchants or others trading by sea, to spoil them of their goods or treasure; and he is called *hostis humani generis* . . . ." (first emphasis added)).

Other 19th century decisions refer to piracy under the law of nations in terms broad enough to encompass an attack on the high seas that does not result in the actual taking of property. *See The Ambrose Light*, 25 F. 408, 417 (S.D.N.Y. 1885) ("One of the forms of piracy mentioned by Prof. Perels (Int. Mar. Law, Sec. 16, p. 127) is, 'ships that sail without any flag, or without a flag sanctioned by any sovereign power; or that usurp a flag, and commit acts of violence under it.'"); *id.* at 423 ("No doubt *indiscriminate violence* and robbery on the high seas are piracy"

(emphasis added)); *Dole v. New England Mutual Marine Ins. Co.*, 7 F. Cas. 837, 847 (C.C. Mass. 1864) (stating, in dicta, that piracy under the law of nations includes "the act of cruising upon the high seas without a commission and with the intent to rob, especially if the charge be accompanied by proof of unsuccessful attempts about the same time to commit the primary offence.").

In his seminal treatise on International Law, Oppenheim states that "[p]iracy, in its original and strict meaning, is every unauthorized act of violence committed by a private vessel on the Open Sea against another vessel with intent to plunder (*animo furandi*)." 1 Oppenheim, INTERNATIONAL LAW, § 276, p. 325 (1905). As particularly pertinent here, Oppenheim notes that: "[t]he act of violence need not be consummated: a mere attempt, such as attacking or even chasing a vessel for the purpose of attack, by itself comprises piracy." *Id.* at p. 329.

In 1934, the British Privy Council in *In re Piracy Jure Gentium* considered and rejected the very argument made by the defendants in this case. *In re Piracy Jure Gentium* addressed the question "whether actual robbery is an essential element of the crime of piracy jure gentium, or whether a frustrated attempt to commit a piratical robbery is not equally piracy jure gentium...." *In re Piracy Jure Gentium*, [1934] A.C. 586, 586. The Privy Council concluded that: "Actual robbery is not an essential element in the crime of piracy jure gentium. A

frustrated attempt to commit a piratical robbery is equally piracy jure gentium." *Id.* at 588.[11] This conclusion was based, as the court noted, not only on the consensus of the best reasoned extant opinions and decisions, but also on common sense.

Consistent with the Geneva Convention and UNCLOS, these various authorities reflect the sensible conclusion that the crime of piracy cannot be defined such that it turns simply on whether the victim vessel mounts a successful defense or gets away. UNCLOS and the Geneva Convention authorize the seizure of pirate ships before the attack is carried out. *See* UNCLOS art. 105 (granting states authority to seize pirate ships, and defining pirate ships by reference to UNCLOS Article 103, which in turn references Article 101, which is broader than robbery); Geneva Convention arts. 15, 17, 19. But the District Court's holding raises the question whether a navy vessel, witnessing an armed attack by pirates on the high seas against a merchant vessel, would be precluded from intervening until

[11] While the Privy Council's decision would be considered advisory in the United States judicial system, it nevertheless should carry significant weight. First, as noted above, it squarely addresses the specific issue presented in this case. Second, *In re Piracy Jure Gentium* was decided by a British court with purview over the British Colonies; the British Empire was the preeminent maritime power of the Nineteenth and early Twentieth Centuries and pronouncements from its high courts regarding the nature of piracy under international law ought to carry particular weight. *Cf. Flores*, 414 F.3d at 257 ("the more States that have ratified a treaty, and the greater the relative influence of those States in international affairs, the greater the treaty's evidentiary value").

the pirates actually captured the ship, at which point intervention could well be futile.

c. The sources relied on by the District Court cannot and do not call into question the inclusion of violent attacks on the high seas in the definition of piracy.

Despite UNCLOS, the Geneva Convention, *In re Piracy Jure Gentium*, and the other authorities discussed above, the District Court nevertheless decided that there is no authoritative definition of piracy under international law. JA 163. In support of this conclusion, the District Court cited several law review articles and Professor Rubin's treatise on piracy. *Id.*

The articles relied on by the District Court, which are *at best* of secondary relevance, do not stand for the proposition that UNCLOS and the Geneva Convention fail to supply the customary international law definition of piracy. In most cases the articles note only that customary international law, *prior to* the Geneva Convention and UNCLOS, failed to provide a clear definition of all aspects of piracy. *See* Tuerk, *The Resurgence of Piracy: A Phenomenon of Modern Times*, 17 U. MIAMI INTER'L & COMP. L. REV. 1, 10 (2009) ("Piracy was first authoritatively defined in the aforementioned Convention on the High Seas and later in UNCLOS . . . ."); Gabel, *Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy*, 81 TUL. L. REV. 1433, 1441

(2007) (author, a private attorney, contrasts the Geneva Convention and UNCLOS with prior law). The authors also criticize the international definition of piracy for reasons unrelated to this circumstances presented in this case, and they include the offense conduct charged in this case in the definition of piracy. *See* Gabel, 81 TUL. L. REV. at 1434, 1443 (defining piracy as including "unauthorized acts of violence" and later assuming that UNCLOS is considered to be the law-of-nations definition of piracy).

The District Court's reliance on Professor Rubin is particularly misplaced because, as evinced by the District Court's quotation from Professor Rubin's book, Professor Rubin takes the position that there is no definition of piracy under international law. JA 163, 166 n.6. That skeptical view has been rejected in the Constitution, by Congress when it has repeatedly passed Section 1651, and by the Supreme Court in *United States v. Smith*.

3. At all periods relevant to this case, the law of nations has included the defendants' conduct in the definition of piracy.

For the reasons given above, Section 1651 incorporates the definition of piracy supplied by international law at the time of the offense, and that international law included the offense conduct charged in this case. Should this Court agree with the government's analysis on this point, it is unnecessary for the

Court to consider whether the offense conduct charged here fell within the definition of piracy supplied by the law of nations in 1819.

However, the government notes that various authorities preceding 1819 included the offense conduct in this case within their definition of piracy. *See supra* pp. 43-46. Neither the District Court nor the defendants below identified any authority or decision that specifically excluded the offense conduct charged in this case from the definition of piracy.

C. Section 1651's Application to the Defendants' Conduct in this Case does not Violate the Due Process Clause Because the Law Clearly Proscribed Their Violent Attack on the USS Ashland.

The District Court concluded that if Section 1651 is construed to criminalize violent attacks that do not involve the actual taking of property, it would violate the Due Process Clause's notice requirements. JA 165.

In *United States v. Smith*, however, the Supreme Court squarely rejected the claim that defining piracy according to the law of nations was unconstitutionally vague. As *Smith* held, it is entirely permissible for a federal criminal offense to reference another body of law, so long as the crime as defined by that other body of law is sufficiently definite.

For all the reasons provided above, there is a clear and consistent line of authorities that establish – well in advance of April 2010 – that the defendants'

conduct constitutes piracy under the law of nations. The Geneva Convention and UNCLOS (which has been ratified by Somalia) are two in-force international treaties negotiated by dozens of countries that define piracy in exactly the same way, accordingly gave the defendants ample notice that their actions were considered piracy under international law. *Cf. United States v. Shi*, 525 F.3d 709, 724 (9th Cir. 2008) (concluding that there was no due process bar to prosecuting, in the United States, Shi's acts of mutiny and murder on the high seas because the acts constituted piracy, and "we conclude that the universal condemnation of Shi's conduct and the existence of the [2005] Maritime Safety Convention provided him with all the notice due process requires that he could be prosecuted in this country").

The defendants can hardly claim they did not believe an armed assault on another vessel would not subject them to criminal liability because, despite the clarity of the Geneva Convention and UNCLOS, they acted in reliance on the belief that Section 1651 was restricted to its construction in the 1820 *Smith* decision. As was noted in *In re Piracy Jure Gentium*, common sense would indicate that an armed assault of the nature perpetrated by the defendants in this case is piracy. In addition, the defendants conceded, and the District Court concluded, that they are properly charged under various other criminal provisions,

including Sections 1659, 113, and 924(c). Therefore, there is no danger of ensnaring individuals who thought they were engaged in innocent activity. *Cf. Bryan v. United States*, 524 U.S. 184, 195 (1998).

The fact that certain law review articles raise questions about the application of UNCLOS in contexts different from the offenses charged here does not change the analysis. "[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *Parker v. Levy*, 417 U.S. 733, 757 (1974) (internal quotation marks and citation omitted). *See also Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2721 (2010) (where statute is not vague as applied to individual's acts, hypotheticals about other applications are "beside the point"); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) ("[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others" (footnote omitted)). Conjecture about the prosecution of a slingshot case is no reason to hold that Due Process forbids Section 1651's application to the defendants' violent, armed assault on the high seas.

CONCLUSION

For the reasons stated, this Court should reverse the District Court's order dismissing Count 1 of the superseding indictment.

Respectfully submitted,

Neil H. MacBride
United States Attorney

By: /s/
Benjamin L. Hatch
Assistant United States Attorney
United States Attorney's Office
101 West Main Street, Suite 8000
Norfolk, Virginia 23510
(757) 441-6331
Email: Benjamin.Hatch@usdoj.gov

By: /s/
Joseph E. DePadilla
Assistant United States Attorney
United States Attorney's Office
101 West Main Street, Suite 8000
Norfolk, Virginia 23510
(757) 441-6331
Email: Joe.DePadilla@usdoj.gov

By: /s/
Raymond E. Patricco, Jr.
Assistant United States Attorney
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3700
Email: Raymond.Patricco@usdoj.gov

By: /s/
Virginia Vander Jagt
Trial Attorney
United States Department of Justice
National Security Division
10th & Constitution Avenue, N.W.
(202) 514-0849
Email:Virginia.Vanderjagt@usdoj.gov

By: /s/
Jerome Teresinski
Trial Attorney
United States Department of Justice
National Security Division
10th & Constitution Avenue, N.W.
(202) 514-0849
Email:Jermone.Teresinski@usdoj.gov

STATEMENT WITH RESPECT TO ORAL ARGUMENT

The United States respectfully requests oral argument.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief does not exceed 14,000 words (specifically 11,916 words), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X3 in 14-point Times New Roman typeface.

/s/
Benjamin L. Hatch
Assistant United States Attorney
United States Attorney's Office
101 West Main Street, Suite 8000
Norfolk, Virginia 23510
(757) 441-6331
Email: Benjamin.Hatch@usdoj.gov

ADDENDUM

ADDENDUM A

ADDENDUM B

CERTIFICATE OF SERVICE

This is to certify I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user, and that one copy of the foregoing Brief of the United States were mailed to the attorney listed below on this 29th day of October, 2010:

Keith L. Kimball
Assistant Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510
(Counsel for Mohamed Ali Said)

Trey R. Kelleter, Esq.
500 World Trade Center
Norfolk, Virginia 23510
(Counsel for Abdi Razaq Abshir Osman)

Robert B. Rigney, Esq.
500 East Main Street, Suite 1520
Norfolk, Virginia 23510
(Counsel for Mohamed Abdi Jama)

David M. Good, Esq.
2492 North Landing Road, Suite 104
Virginia Beach, Virginia 23456
(Counsel for Mohamed Farah)

Bruce C. Sams, Esq.
208 Plume Street, Suite 210
Norfolk, Virginia 23510
(Counsel for Abdicasiis Cabaase)

/s/
Benjamin L. Hatch
Assistant United States Attorney
United States Attorney's Office
101 West Main Street, Suite 8000
Norfolk, Virginia 23510
(757) 441-6331
Email: Benjamin.Hatch@usdoj.gov